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No. 00-581

IN THE
Supreme Court of the United States

CBS, INC.; WESTINGHOUSE PENSION PLAN,
Petitioners,

v.

HARRY BELLAS,
Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Third Circuit

REPLY BRIEF FOR PETITIONERS

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REPLY BRIEF FOR PETITIONERS

In its petition, CBS showed (Pet. 12-17) that the decision below conflicts with the decisions of two federal courts of appeals and with the Internal Revenue Service's General Counsel Memorandum 39869 ("GCM 39869") on the question whether section 204(g) of ERISA applies to shutdown or other unpredictable contingent-event benefits. CBS further showed (Pet. 17-19) that this conflict and confusion undermine ERISA's strong interest in uniformity of pension rules and, furthermore, that the Third Circuit's interpretation of section 204(g) imposes harsh consequences on plan sponsors, plan beneficiaries, and the Pension Benefit Guarantee Corporation ("PBGC"). CBS also showed (Pet. 19-28) that the decision below misconstrues section 204(g).

The brief in opposition repeatedly ignores the very decision that it contends is correct on the merits and should not be reviewed by this Court. Respondent Bellas suggests (Opp. 1-2 n.1) that this case does not involve shutdown benefits at all, but the court of appeals repeatedly held that it does (Pet. App. 13a-14a n.4, 29a, 31a). Bellas denies the circuit conflicts (Opp. 8-11) and conflict with GCM 39869 (Opp. 11-14) that the court of appeals acknowledged in painstaking detail (Pet. App. 13a-14a, 17a-29a). Bellas denies the "harsh consequences" from the decision below (Opp. 14-15) that the court of appeals likewise acknowledged (Pet. App. 43a-45a). And, while Bellas asserts that this case involves "a straightforward application of an unambiguous statute" (Opp. 4), the court below acknowledged that the controlling statutory term is undefined (Pet. App. 14a) and that the applicability of section 204(g) to shutdown benefits is a matter of both "great importance" and "great complexity" (Oral Arg. Tr. 55).

Immediate review by this Court is both necessary and appropriate. As the petition and the *amici* in this case demonstrate, pension plans and their sponsors around the country need this Court's immediate guidance about a complex question, clearly presented here, that has divided

federal courts and the IRS. The arguments advanced by the brief in opposition simply fail in the face of the decision below and, in all events, do not withstand scrutiny.

1. Citing the concurring opinion below, Bellas initially suggests (Opp. 1-2 n.1) that this case does not involve shutdown benefits at all. That is incorrect.

GCM 39869 defines "shutdown benefits" as benefits made available "upon the occurrence of an event that causes an individual's employment to change." Pet. App. 96a. Here, the benefit at issue was contingent on a "termination . . . through no fault" of the employee for "lack of work for reasons associated with the business." Pet. App. 5a.

In any event, the decision below encompasses *all* "contingent event benefits that continue beyond normal retirement age," because "there does not appear to be any relevant distinction between plant shutdown benefits and a more broadly defined contingent event benefit." Pet. App. 31a. The court of appeals thus expressly rejected Bellas's contrary suggestion:

> Notwithstanding the concerns raised in the concurring opinion, we find that the resolution of the questions presented here turns not upon the nature of the contingent event that triggered payment of the benefit, but on whether the benefit continues past normal retirement age. . . . The nature of the event that caused the employee's termination does not control this inquiry.

Pet. App. 13a-14a n.4.

2. Bellas also argues (Opp. 8-11) that there is no judicial conflict concerning the applicability of section 204(g) to shutdown and other unpredictable contingent-event benefits. However, the court of appeals itself acknowledged a "split of authority" on "the extension of section 204(g)'s coverage to benefits whose payment is contingent upon the occurrence of

an unpredictable event" (Pet. App. 13a-14a), surveyed the conflicting appellate precedents in detail (Pet. App. 17a-25a), and expressly refused to "adopt the contrary case law" of the Sixth and Eleventh Circuits (Pet. App. 29a).

Bellas nonetheless insists (Opp. 8-9 & n.14) that the construction of section 204(g) in *Ross v. Pension Plan for Hourly Employees of SKF Industries, Inc.*, 847 F.2d 329 (6th Cir. 1988), is mere dicta, on the theory that that case assertedly did not involve a plan amendment, and on the theory that the plaintiffs in *Ross* assertedly did not meet applicable age and service requirements. Bellas is wrong because his theories ignore the ground of decision in *Ross*. The Sixth Circuit held that, "regardless of whether" a plan amendment was present, "plant shutdown benefits are not benefits which section 204(g) was intended to protect." *Id.* at 332. Moreover, although the Sixth Circuit did conclude that five of the 52 plaintiffs in *Ross* had not satisfied the applicable age and service requirements, it did so only after completing its independent analysis of section 204(g), and only in the course of rejecting "additional" arguments of these five plaintiffs "unrelated to their section 204(g) claim." *Id.* at 334.

Bellas errs (Opp. 10) in attempting to similarly dismiss *Roper v. Pullman Standard*, 859 F.2d 1472 (11th Cir. 1988) (per curiam). Contrary to Bellas's contention, that case was not decided on the ground that no amendment was present or that the plaintiff had not satisfied applicable age and service requirements. *See id.* at 1473-74. Moreover, although *Roper* involved construction of the term "early retirement benefit" under section 206(a) of ERISA, the Eleventh Circuit expressly endorsed *Ross*'s construction of the identical term under section 204(g) of ERISA as one "alternative ground for affirming the judgment" in that case. *See id.*

Finally, Bellas errs (Opp. 10) in attempting to distinguish *Rombach v. Nestle USA, Inc.*, 211 F.3d 190 (2d Cir. 2000), and *Arndt v. Security Bank S.S.B. Employees' Pension Plan*, 182

F.3d 538 (7th Cir. 1999), as cases involving disability benefits defined by ERISA to be welfare benefits. ERISA's definition of "welfare" benefits includes benefits paid "in the event of sickness, accident, disability, death *or unemployment*." 29 U.S.C. § 1002(1) (emphasis added). Like disability benefits, shutdown and other job separation benefits fit squarely within this definition. In any event, the decision below expressly extends to all "contingent event benefits" (Pet. App. 31a) and makes clear that "resolution of the questions presented here turns not on the nature of the contingent-event that triggered payment of the benefit" (Pet. App. 13a-14a n.4). In short, the distinction of *Rombach* and *Arndt* offered by Bellas was rejected by the court below itself.

3. Even more remarkable is Bellas's erroneous contention (Opp. 13-14) that GCM 39869 is not in conflict with the decision below and "does not support" CBS's interpretation of section 204(g). The IRS formally approved the plan amendment at issue in this case based on a citation to GCM 39869. Pet. 7. Moreover, the court of appeals expressly acknowledged that its decision "depart[ed] significantly from the GCM" (Pet. App. 26a n.12), just as the district court had similarly acknowledged that its decision "is not consistent with (and indeed is contrary to) the . . . GCM" (Pet. App. 71a). And petitioners' *amici*, which represent the regulated community of ERISA plan sponsors, confirm that GCM 39869 "has been widely understood to mean that [contingent event] benefits may safely be eliminated or modified prospectively, that is, before the shutdown, job loss, or other triggering event occurs." Br. *Amici Curiae* of the ERISA Industry Committee and the American Benefits Council at 4 (hereafter "ERIC *Amicus* Br").

Relying on an isolated, out-of-context statement from the IRS Manual and headers apparently attached to GCMs by online database providers, Bellas also erroneously contends (Opp. 11-12) that GCM 39869 does not represent the "official

position" of the IRS. The passage from the IRS Manual selectively quoted by Bellas addresses only the initial preparation of a GCM by the Chief Counsel's Office. *See* IRS Manual § (39)(10)71-4 (Dec. 2, 1992). The Manual goes on to describe an elaborate process of review, reconciliation, and approval, after which a GCM becomes an authoritative statement of the IRS that is "available to the general public." *Id. See generally id.* §§ (39)(10)50, (39)(10)60-(5) & (6), (39)(10)20-(4) (Dec. 2, 1992), (30)722-(3) (Mar. 26, 1985) (describing review and reconciliation process). Accordingly, almost twenty years ago, the D.C. Circuit held and confirmed that, once subjected to this process, GCMs are "'adopted' as final statements of agency policy and function as the 'working law' of the agency." *Taxation With Representation Fund v. IRS*, 646 F.2d 666, 683 (D.C. Cir. 1981); *accord id.* at 682 ("a completed GCM becomes an expression of agency policy"). IRS regulations and guidance now accord with this holding. *See, e.g.*, Treas. Reg. § 1.622-4(d)(3)(iii) (GCMs provide "substantial authority for the tax treatment of an item"); IRS Manual § 7.2.11 (May 14, 1999) (GCMs "can be helpful in understanding the reasoning behind a particular ruling and the Service's response to similar issues in the future"). Therefore, again parting company with Bellas, the court below acknowledged both that the GCM is "the Internal Revenue Service's interpretation of" section 204(g) (Pet. App. 8a) and that plan sponsors have "relied reasonably on GCM 39869" (Pet. App. 44a).

Bellas further errs in contending (Opp. 12 & nn.19-20) that courts may freely "refus[e] to rely" on GCMs. This Court has relied on GCMs, *see, e.g., Corn Products Refining Co. v. Comm'r*, 350 U.S. 46, 52-53 & n.18 (1955), as have the lower courts, *see, e.g., Chicago Milwaukee Corp. v. United States*, 40 F.3d 373, 376 (Fed. Cir. 1994); *United States v. Wisconsin Power & Light Co.*, 38 F.3d 329, 334-35 (7th Cir. 1994); *Gillis v. Hoechst Celanese Corp.*, 4 F.3d 1137, 1146 (3d Cir. 1993); *Morganbesser v. United States*, 984 F.2d 560, 563 (2d

Cir. 1993). Of course, GCMs are not "binding" (Opp. 12 n.20) to the extent that courts may reject particular GCMs as inconsistent with an unambiguous statute or as otherwise unreasonable. But, as CBS has demonstrated (Pet. 27), GCM 39869 easily qualifies for deference under *Skidmore v. Swift & Co.*, 323 U.S. 134 (1944), and its progeny.

4. Bellas's perfunctory suggestion that the decision below "will not have harsh consequences" (Opp. 14) is equally incorrect. As the petition for certiorari demonstrated (Pet. 17-19), the decision below creates further disuniformity in the construction of section 204(g), denies plan sponsors the flexibility to adjust contingent-event benefits with changing economic conditions, exposes the PBGC to substantial new liabilities, and exposes many plans to the threat of immediate tax qualification and enormous classwide benefits liabilities. Petitioners' *amici* confirm that plan sponsors nationwide are now "subject to different and conflicting standards with respect to the propriety of plan amendments that modify or eliminate shutdown or similar job separation benefits" (ERIC *Amicus* Br. at 5), and that, as a result, "no employer, in any federal jurisdiction, is likely to risk adding or improving" shutdown benefits in its pension plan (*id.* at 7).

Bellas offers no serious response about this plain and compelling need of pension plan sponsors and fiduciaries for guidance about the proper construction of section 204(g). Nor does Bellas address the enormous retroactive liabilities that would be imposed on plans and plan sponsors. Bellas's further silence about the imposition of enormous additional liabilities on the PBGC is unsurprising, because his own counsel, relying in principal part on the decision below, is currently seeking to impose precisely such a liability on the PBGC. *See Coleman v. Pension Benefit Guar. Corp.*, 94 F. Supp. 2d 18 (D.D.C. 2000).

On the specific issue of tax disqualification, Bellas offers only an unsupported suggestion (Opp. 15) that the IRS is

"unlikely" to "retroactively" disqualify plans that relied on a favorable IRS determination letter when reducing or eliminating shutdown benefits. But this response offers no comfort to the many other plans that, according to the court of appeals (Pet. App. 44a), "relied reasonably" on the GCM without seeking a confirming determination letter, but nonetheless are subject to "significant adverse tax consequences as a result of this opinion."

5. Bellas devotes the bulk of his opposition (Opp. 2-8) to a simplistic and erroneous argument about the merits of the question presented. He is wrong on all counts.

Bellas's cavalier assertion that this case involves only "a straightforward application of an unambiguous statute" (Opp. 4) is inconsistent with the text of section 204(g) itself, which requires the operative terms "early retirement benefit" and "retirement-type subsidy" to be "defined by regulations" that remain as yet unpromulgated. Moreover, Bellas's assertion is further belied by the welter of conflicting authority on the applicability of section 204(g) to shutdown benefits, by the presiding judge's remark that this question is one of "great importance" and "great complexity" (Oral Arg. Tr. 55), and by the lengthy and complicated analysis ultimately adopted by the court of appeals.

Bellas's argument that a "retirement" benefit includes any benefit that "provides fixed periodic income throughout the employee's retirement years" (Opp. 2-3) is unduly simplistic. That contention ignores the definitional section of ERISA, which provides that the term "retirement" benefit does *not* encompass benefits conditioned on contingent events such as "sickness, accident, disability, death or unemployment" (29 U.S.C. § 1002(1)). *See* Pet. 2-3, 20. His argument ignores ERISA's decision to afford no protection under section 204(g) to "ancillary" benefits from a pension plan that are "not *directly* related to retirement income" (26 U.S.C. § 415(b)(2)(B) (emphasis added)). *See* Pet. 3, 20-21. It

ignores the existence in ERISA of a legally distinct category of "unpredictable contingent event" benefits that cannot be funded prior to the contingency (29 U.S.C. § 1082(d)(7)(B)). *See* Pet. 5, 22-23. And it ignores judicial decisions that, on the basis of these complex statutory provisions, have held, for example, that section 204(g) is inapplicable to pension benefits paid in the event of disability and/or shutdown, even though the benefits commence prior to normal retirement, eliminate an actuarial reduction, and are paid for life on a monthly basis out of a pension trust. *See, e.g., Rombach*, 211 F.3d at 191, 192-93; *Ross*, 847 F.2d at 330-31.

Bellas errs further (Opp. 5) in contending that Treasury Regulation 1.411(d)-4 supports his position. The subpart cited by Bellas (Q&A-4(b)) discusses only the extent to which an employer may exercise discretion in administering a protected benefit; it does not purport to address whether a benefit is, in fact, protected by section 204(g). Indeed, in promulgating the regulation, the IRS declined to "address the extent to which a plant closing or shutdown benefit . . . constitutes an early retirement benefit or a retirement-type subsidy." 53 Fed. Reg. 26,050, 26,051 (1988).

Bellas next urges (Opp. 5-6) that the "implication" of one passage of legislative history is that section 204(g) applies to shutdown benefits. But, as CBS demonstrated (Pet. 23-25), the negative "implication" of a Committee Report is not an authoritative expression of law, and, in any event, a full reading of the legislative history confirms that section 204(g) is inapplicable to shutdown and other unpredictable contingent-event benefits.

Bellas errs further in contending (Opp. 6 n.7) that the "legislative history" of OBRA, which he mischaracterizes as a "wholly different statute" from ERISA, has no bearing on the correct construction of section 204(g). OBRA, which amended ERISA, by its terms delineates a category of "unpredictable contingent event" benefits that cannot be

funded prior to the occurrence of the triggering contingency. *See* 29 U.S.C. § 1082(d)(7)(B); IRC § 412(l)(7)(B). As CBS has demonstrated (Pet. 22-23, 25-26), OBRA is highly relevant, because related statutes must be construed to "'make sense' in combination" (*United States v. Fausto*, 484 U.S. 439, 453 (1988)), and because harmonizing the entitlement and funding provisions of ERISA furthers the purposes of this complex statute.

Bellas plainly errs in suggesting (Opp. 7) that CBS has waived its argument that shutdown benefits are welfare benefits provided through a pension plan. In its opening brief to the court of appeals, CBS expressly argued that section 204(g) does not protect welfare benefits permissibly provided through a pension trust — so-called "ancillary" benefits. Appellant's Br. at 6-7, *Bellas v. CBS, Inc.*, CA3 No. 99-3775 (Nov. 15, 1999). CBS repeated this argument in its reply brief, with specific citation to the *Arndt* case. Appellants' Reply Br. at 16, 21-22. And, nine days after the *Rombach* case held that disability pensions are "welfare" benefits not protected by section 204(g), CBS notified the court of appeals of that decision pursuant to Fed. R. App. P. 28(j). The issue was then addressed both in oral argument (Oral Arg. Tr. at 48-52) and in the decision below (Pet. App. 31a n.15).

Bellas fares no better in contending (Opp. 7 & n.10) that shutdown benefits are conditioned on "job separation" rather than "unemployment," because they continue "even if one is re-employed elsewhere shortly after layoff." This distinction is mere wordplay, for the shutdown benefit at issue was conditioned on "termination of the employment of an Employee" (Pet. App. 5a), which plainly constitutes a benefit provided "in the event of . . . unemployment" (29 U.S.C. § 1002(1)). Moreover, any possible difference between "job separation" and unemployment benefits is immaterial in any event, both because permanent separation benefits are plainly "welfare" benefits, and because the court below rejected any

distinction based on "the nature of the contingent event that triggered payment of the benefit." Pet. App. 14a n.4.

Finally, Bellas erroneously argues (Opp. 7-8) that the "import" of Treas. Reg. § 2510.3-2 is that shutdown benefits are protected retirement benefits. On its face, that regulation addresses only "certain specific plans . . . which do not constitute employee pension benefit plans" (*id.* § 2510.3-2(a)), including "severance plans" payable for less than 24 months (*id.* § 2510.3-2(b)). The regulation does not purport to address which benefits provided by pension plans are "retirement" benefits protected by section 204(g), as opposed to "ancillary" pension plan benefits to which section 204(g) is inapplicable.

CONCLUSION

For the foregoing reasons, as well as those stated in the petition, certiorari should be granted.

Respectfully submitted,

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